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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOHN ALVIN PAYNE, Defendant and Appellant.	C081676 (Super. Ct. No. 15F07618)

Defendant John Alvin Payne entered a no contest plea to three counts of second degree robbery (Pen. Code, § 211—counts one, two and four)[1] and one count of resisting an executive officer (§ 69—count six), and admitted a strike prior (§§ 667, subds. (b)-(i), 1170.12). Defendant entered his plea and admission in exchange for a stipulated sentence of 15 years four months and the dismissal of the remaining counts (another robbery count and an attempted robbery count) and allegations (five prior prison term

[1] Undesignated statutory references are to the Penal Code.

allegations) with a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754 for purposes of restitution.

After denying defendant's motion to withdraw his plea, the court sentenced defendant to state prison for an aggregate term of 15 years four months. The court dismissed the remaining counts and allegations.

Defendant appeals. The trial court granted defendant's request for a certificate of probable cause. (§ 1237.5.) Defendant contends the trial court erred in failing to appoint new counsel to file a motion to withdraw his plea or to continue sentencing for presentation of additional information related to defendant's claims of a prior serious brain injury, lack of contact with counsel, and his duress defense to the charges. We do not find any error and will affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On September 14, 2015, defendant robbed an employee at a US Bank. Wearing a disguise, defendant entered the bank branch and forcefully demanded money. The employee complied, giving defendant cash from the till.

On September 25, 2015, defendant robbed an employee at a Comfort Inn. Wearing a disguise, defendant entered the office of the inn and forcefully demanded money. The employee complied, giving defendant cash from the register.

On October 3, 2015, defendant robbed an employee at a Subway. Wearing a disguise (a fake wig and mustache), defendant entered the restaurant at closing time and forcefully demanded money. The employee complied, giving defendant the bank deposit bag. Defendant fled to a getaway vehicle driven by his codefendant Shannon Brawith.

On December 16, 2015, defendant resisted officers. Two officers attempted to arrest defendant on warrants issued for the robberies. Defendant was in the back of a

pickup truck, took a fighting stance, and violently resisted. One officer suffered a bruised knee and the other officer suffered scratches and abrasions.

In 2007, defendant was convicted of assault on a peace officer by means likely to produce great bodily injury (§ 245, subd. (c)), a serious felony under section 1192.7, subdivision (c)(31).

A complaint filed December 18, 2015, in case No. 15F07618, charged defendant with the resisting offense and the 2007 strike prior. He was arraigned the same day and counsel was appointed.

A complaint filed December 23, 2015, in case No. 15F07662, charged defendant with the US Bank, Comfort Inn, and Subway robbery offenses as well as a robbery offense on September 27, 2015, of an employee at Courtyard Marriott, and the 2007 strike prior. He was arraigned the same day and counsel was appointed.

Settlement conferences were held on January 5, 2016, February 2, 2016, February 18, 2016, and March 1, 2016.

On January 22, 2016, the prosecutor moved to consolidate the complaints in case Nos. 15F07618 and 15F07662 as well as case Nos. 15F07620, 15F07625, and 16FE000761. The motion was granted on February 18, 2016.

An amended consolidated complaint charged defendant with the US Bank, Comfort Inn, Courtyard Marriott (amended to an attempted robbery), and Subway robberies as well as a robbery of an employee at Papa Murphy's on December 15, 2015, and alleged the 2007 strike prior. Two codefendants were also charged, Shannon Brawith (count four; Subway) and Kristen Pelkey (count five; Papa Murphy's). The amended complaint added five prior prison term allegations against defendant, prison terms he served for a 1996 grand theft from the person, 1999 vehicle theft, 2001 vehicle

theft, 2003 petty theft with priors, and 2007 felony evading. Total bail was set at $1,465,000.

On March 10, 2016, the date set for the preliminary hearing, defendant entered his plea. Defendant was represented by counsel as he had been since his arraignment on December 18, 2015.

The prosecutor set forth the plea agreement. Defense counsel agreed the prosecutor had correctly stated the plea agreement. Defense counsel added that defendant would waive a probation report and was seeking immediate sentencing, noting that the robberies had occurred some time ago, and "[w]e have a lot of information on [defendant]." The court thought a referral to probation was necessary to contact the victims and determine whether any wanted to submit a statement regarding the resolution of the case. Defendant started to speak but the court instructed him to consult with defense counsel.

After an off-the-record conversation between defendant and defense counsel, defendant again asked to speak. Defense counsel did not object. After warning defendant that it might be unwise, the court invited defendant's comment. Defendant stated: "I would appreciate it fully. I just had brain surgery, right? About three months ago, I had brain surgery and—well, about four months ago I had brain surgery. [¶] And I'm having trouble staying at the county jail. You know, it's driving me crazy being confined. I'm on psychiatric meds now, and they've put me on medication. [¶] And I'm just—I came here—you want to know the truth? I came here to take the 15 years just to basically get out of there, get out of that jail, sir. It's just driving me crazy. [¶] My brain surgery—I was in brain surgery—I was in the hospital seven weeks. All these crimes occurred after the brain surgery. You know, he said I didn't have a defense with that." The court interrupted, advising defendant not to discuss the facts of the case, and stated

that it understood defendant's desire "to get on [his] way . . . to prison as opposed to being in county jail."

The court advised that it would be sending the matter to probation to advise the victims that they had an opportunity to speak or submit statements at sentencing. The parties then had a conference with the court in chambers.

Thereafter, in open court, the prosecutor represented that he would contact the victims and advise the court whether any of the victims desired to make a statement, which he doubted. The court advised defendant that they were accommodating his request, would take his plea, and return for sentencing in five days (Thursday, March 10 to Tuesday, March 15). Defendant said, "Okay," and "That's fine. Thank you."

The prosecutor then set forth the factual basis for the plea. Defense counsel stipulated to the same. The court advised defendant of his constitutional rights and defendant stated he understood and waived each of his rights. The parties joined. The court advised defendant of the consequences of his plea, which defendant stated he understood. Defendant agreed that the court could consider the dismissed charges in sentencing and restitution. The court advised defendant that he was bound by his plea, could not withdraw it simply because he changed his mind, and would have to have legal cause to do so. Defendant stated that he understood and confirmed that he had had enough time to discuss his case, including the elements of the offenses, any defenses that may apply, and the consequences of his plea with his attorney. Defendant agreed that he had not been promised anything other than what had been discussed in court and no one had threatened him to enter his plea. When asked if he was under the influence of any alcohol, drugs or medication, defendant stated he was taking medications but they did not impair his ability to understand and confirmed he understood his plea and disposition. Defendant had no questions. Defendant then entered his pleas to the offenses and admitted the strike prior and confirmed that he was entering the same freely and

voluntarily. The court accepted the plea and scheduled sentencing. Defense counsel requested that the court direct the sheriff's department to assess whether defendant could be housed at RCCC (Rio Cosumnes Correctional Center) pending sentencing. The court agreed to ask but said that it would be "in their discretion to make that determination."

At sentencing on March 15, 2016, defense counsel waived formal arraignment but noted defendant had a request. Defendant stated: "I wasn't in my right frame of mind. I have been on psych meds the last—I have—should never—I—sir, I had an injury, brain surgery. He [(defense counsel)] told me that I didn't have no defense. I have been giving—given—" Defense counsel interrupted and stated that defendant wanted to withdraw his plea "for an unknown reason to me. This is the first that he has mentioned this. We clearly did his plea last week. The Court went over his waivers and pleas. I'm ready to proceed. I spent a lot of time with him." Defendant protested that defense counsel had "only spent one time" with him. The court noted that it had covered everything the prior week and sentencing had been scheduled to accommodate defendant.

Defendant then responded:

"I know. I know, sir, but I'm not right in my head. The brain surgery, it—I came—I went through—the hospital—because I was assaulted by somebody that I owed money to. I had brain surgery and was in the hospital seven weeks. He—um, [(defense counsel)]—I have had three different lawyers appointed to me within four court dates. He has never spent any time with me. The only thing he has told me was that I have no defense. I have none. I said, 'Well, can I get some mental—somebody to look at my medical files and see that I was—under great duress, you know?' And he has told me—all he has done is every time he has talked to me is tell me, You're pleading guilty. You're pleading guilty.

"And I can't—I can't understand why he wants—15 years is—is a death sentence to me. I have a failing liver anyways and I'm thinking if this—if the Courts asked—I

asked the Courts let's simply look at my medical records and they will see how traumatic a brain injury I had. I had a traumatic—I'm sorry. When I get talking a lot of my speech gets messed up.

"I had a traumatic brain injury, and because of that is the reason I pled guilty and I shouldn't have. I shouldn't have pled guilty for my life's on the line and I know—I know I told you that I was going on the advi[c]e of my counselor, which I will represent myself and then have him represent me, you know. I will go pro. per. But due to my—due to my head surgery—I was on the table eight hours for brain surgery. I was—I was on life support for two, three weeks and then I was in the hospital four more weeks. I know I shouldn't have did this. I know that all these crimes occurred after the brain surgery. All of them. It was obvious that I was trying to pay back some people who were going to put me back in a coma again. They had broken my neck. They broke my neck the first time and then the report says the patient apparently was assaulted, was stabbed on the ground and brought to Mercy San Juan as a code trauma. A head CT was performed and demonstrated evidence of traumatic subdural hematoma and contusion. Clearly he is deteriorating and he suffers several neurological deficits or death."

The court interrupted and asked defense counsel, "[I]s there anything else on this?" Defense counsel responded, "We have fully looked into this issue." Defense counsel noted that there had been two "intake attorneys" who both advised defendant "to resolve" the case. Defense counsel stated that the "traumatic brain injury occurred before these robberies and also before the assault against the police officer, the [section] 69, which he pled guilty to." After noting defendant's extensive criminal history including six prior prison terms and his age (50's), the plea agreement for 15 years four months gave defendant "a realistic expectation of getting out of custody." Defense counsel stated that he had had several conversations "in [his] office . . . [a]nd our office has spent a lot of time with [defendant]. . . . I think he has gotten jailhouse advice that he needs to

withdraw the plea." Defendant wanted to withdraw his plea, stating that he was willing to face the "[t]hirty-something years of exposure." Defendant said he wanted someone "to look at [his] medical records" and see that all of the offenses occurred after his brain surgery. Defendant said that defense counsel "never talked to me" and then said, "[h]e told me there is no defense."

The prosecutor believed that it was "an advantageous plea" for defendant. The prosecutor spoke with all the victims and "[t]hey all expressed happiness with the resolution for various reasons."

Defendant stated that he wanted the court to look at his medical records and appoint someone because defense counsel talked to him only one time, said he had no defense, and told him to plead guilty. Defendant claimed he did have a defense, arguing that he committed the offenses "under threats or menace sufficient to show that [he] had reasonable cause to and did believe that [his life] would be [endangered] if [he] refused," citing section 26.

The court referred to the plea colloquy in concluding defendant had not met the requirement of legal cause to withdraw his plea and denied his motion. Defendant then stated, "Due to ineffective assistance of counsel." The court thereafter sentenced defendant to state prison for the aggregate 15 years four months.

DISCUSSION

Defendant contends the trial court erred in failing to appoint new counsel to represent him in a motion to withdraw his plea or at the least, make further inquiry into his claims affecting the validity of his plea. We do not find any error.

"When a defendant is represented by counsel, the grant or denial of an application to withdraw a plea is purely within the discretion of the trial court after consideration of all factors necessary to bring about a just result. [Citations.] On appeal, the trial court's

decision will be upheld unless there is a clear showing of abuse of discretion. [Citations.] An abuse of discretion is found if the court exercises discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice. [Citation.] [¶] Section 1018 requires a showing of good cause to allow withdrawal of a plea. [Citation.] In relevant part, section 1018 provides, 'On application of the defendant at any time before judgment . . . the court may, and in case of a defendant who appeared without counsel at the time of the plea the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.' [¶] ' "While . . . section [1018] is to be liberally construed and a plea of guilty may be withdrawn for mistake, ignorance, or inadvertence or any other factor overreaching defendant's free and clear judgment, the facts of such grounds must be established by clear and convincing evidence. [Citations.]" ' [Citation.] The burden is on the defendant to present clear and convincing evidence the ends of justice would be subserved by permitting a change of plea to not guilty." (*People v. Shaw* (1998) 64 Cal.App.4th 492, 495-496.)

We conclude there is no evidence that defendant was operating under " ' "mistake, ignorance, or inadvertence or any other factor overreaching defendant's free and clear judgment," ' " resulting in an involuntary plea. (*People v. Shaw, supra,* 64 Cal.App.4th at p. 496.)

Defendant argues erroneously that defense counsel was "unaware that (1) [defendant] had suffered a prior traumatic brain injury requiring surgery and (2) that he was taking psychiatric medications." Defendant claims "he committed the offenses because of fear of retaliation from individuals to whom he owed money." Defendant asserts he made these claims "in the first instance at the time of sentencing, approximately one week after the pleas were entered." Defendant argues the trial court should have continued sentencing until sufficient information about these claims was presented for the court to make an informed ruling on defendant's motion to withdraw his

plea. Further, these claims in combination with his claim that defense counsel only visited one time supported a claim of ineffective assistance of counsel and the appointment of new counsel to investigate the same.

When defendant entered his plea, defendant stated that he had had brain surgery, that he wanted to get out of the county jail, that he was taking medication but that the medication did not affect his ability to enter his plea, that he understood that he could not change his plea later without legal cause, and that defense counsel told him he did not have a defense. The court observed defendant's behavior and demeanor as did defense counsel and no impairment was noted. At sentencing, defendant then claimed that his previous brain surgery and medication affected his plea but did not explain in what manner—he only stated that he was "not right in [his] head." The trial court could resolve the factual conflict in favor of defendant's statement at the time he entered his plea that he understood his plea and disposition rather than when he claimed at sentencing that he was "not right in [his] head" when he entered his plea. (See *People v. Hunt* (1985) 174 Cal.App.3d 95, 104 (*Hunt*); *People v. Brotherton* (1966) 239 Cal.App.2d 195, 201 (*Brotherton*).)

With respect to defense counsel's investigation of defendant's mental condition, defense counsel represented to the court, "We have fully looked into this issue." Defense counsel noted that there had been two other attorneys in the public defender's office who had both advised defendant to enter a plea. Defense counsel knew that traumatic brain injury had occurred prior to the offenses. Defense counsel thought the plea agreement gave defendant a "realistic expectation" to be released from custody considering his age and extensive criminal record, which included six prior prison terms. Defense counsel stated that he had had several conversations "in [his] office . . . [a]nd our office has spent a lot of time with [defendant]. . . . I think he has gotten jailhouse advice that he needs to withdraw the plea." The trial court could likewise resolve any conflict in favor of

defense counsel rather than defendant with respect to the investigation of defendant's mental condition. (*Hunt, supra*, 174 Cal.App.3d at p. 104; *Brotherton, supra*, 239 Cal.App.2d at p. 201.)

With respect to defense counsel's investigation of defendant's duress defense, there does not appear to be any evidence that defendant was directed to commit the robberies or resist officers under imminent threat of death to repay creditors. Moreover, defendant did not claim that defense counsel had been unaware of or failed to investigate a potential duress defense. The trial court did not abuse its discretion in concluding that defendant did not demonstrate good cause to withdraw his plea.

"Although criminal defendants are entitled to competent representation in the presentation of a motion to withdraw a plea, appointed counsel may properly decline to bring a meritless motion." (*People v. Brown* (2009) 175 Cal.App.4th 1469, 1472.) When a defendant indicates a desire to withdraw a guilty plea on the ground that current counsel has provided ineffective assistance, a trial court must conduct a *Marsden*[2] hearing only when the defendant clearly indicates, either personally or through counsel, that he wants a substitute attorney. (*People v. Sanchez* (2011) 53 Cal.4th 80, 84.) And, there is no duty to appoint substitute counsel solely to evaluate a defendant's complaint that his attorney was ineffective with regard to advice regarding the entry of a plea. (*Ibid*.) Defendant asked the court numerous times to look at his medical records and variously indicated he would go "pro. per." and later mentioned he wanted "somebody appointed to me." His request at sentencing presented the very procedure disapproved in *Sanchez*—an appointment of a substitute or conflict counsel solely to evaluate defendant's complaint that his attorney was ineffective in his advice on the entry of a plea. The court was not required to appoint substitute counsel to file a meritless motion either. (See *People v.*

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2 *People v. Marsden* (1970) 2 Cal.3d 118.)

Smith (1993) 6 Cal.4th 684, 696; accord, *People v. Sanchez, supra,* 53 Cal.4th at pp. 88-90.)

DISPOSITION

The judgment is affirmed.

BUTZ, Acting P. J.

We concur:

MAURO, J.

MURRAY, J.